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ELECTION MONITORING: THE INTERNATIONAL LEGAL SETTING

GREGORY H. FOX*

I. INTRODUCTION

International law, like all law, is essentially reactive in nature. Norms and institutions generally arise not in a vacuum or as part of a coherent theoretical scheme, but in response to specific events. Sometimes these are events limited to a particular area of human endeavor, such as the launching of Sputnik in the late 1950s, which gave rise to a new international law of Outer Space, or the rising ecological consciousness of the early 1970s spurring the emergence of an international law of the environment. But the triggering events have also been more general. As David Bederman observes, “[o]ne can almost linearly chart the progress of new international organizations, new substantive rules of international conduct, and new procedures of dispute settlement between international actors by the dates that mark the end of cataclysmic wars.”¹

The end of the Cold War certainly qualifies as one such general trigger. The changes in virtually all areas of international law that have followed on the demise of bipolar ideological rivalry are, arguably, comparable to those attending the end of the “hot” wars described by Bederman. This Symposium is focused on one trend emerging from the events of 1989: the transitions from various forms of authoritarian government to species of liberal democratic constitutionalism. Here, the link between the triggering event and the normative innovation seems undeniable, for it is the emergence of democracy in so many different states that is the very subject of the new international law and institutions. An increasing number of scholars – admittedly concentrated in the West and, more specifically, in the United States – has identified an emerging “right to democratic governance” or “democratic entitlement.”² According to this view, both established and newly-democratic states have enlisted the tools of international law to help secure their political institutions and to encourage democratic transitions elsewhere. Such efforts have been encouraged both by a local and global “demonstration effect,”³ as well as the increasingly common view among international organizations that democratic governance is the form of rule most consistent with global standards of human rights.⁴

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¹ DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 3 (2001).

² For a comprehensive discussion of these issues, see generally *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (Gregory H. Fox & Brad R. Roth eds., 2000).

³ See Laurence Whitehead, *Three International Dimensions of Democratization*, in *THE INTERNATIONAL DIMENSIONS OF DEMOCRATIZATION* 3, 21-22 (Laurence Whitehead ed., 1996).

⁴ Report of the Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, para. 77 (1998) (“[d]emocratic government helps to

The profound disagreements of political ideology that marked the Cold War were the most obvious barrier to democracy gaining a foothold in international law. There was also another reason: the alliances forged by the two superpowers had no necessary connection to the mode or quality of governance in third states, but turned instead on their external loyalties. Most liberal democracies were clearly in the Western camp. But the United States also relied on many non-democratic states as allies against the Soviet bloc (e.g. Vietnam, Guatemala, Iran, the Phillipines), as well as regarding a number of democratic states as pursuing uncomfortably pro-Soviet policies (e.g. India). Thus, democratic governance as a question of international relations contained both an internal and an external component. The internal component involved the traditional issues of political theory surrounding the value of democracy as a political organizing principle. The external component involved the utility of democracy to relations between states and the goals defining those relationships. In this way, the external component focused not on the question of whether and how democracy would benefit individual citizens within a particular state, but how purely state-to-state relations would be affected by a principle of domestic governance.⁵

In the post-Cold War era, our assessment of democracy as a norm of international law must not lose sight of these two analytically distinct categories. I will argue in this brief paper that while much of the evidence for an emerging democratic entitlement falls into the first category – involving clarifications of what is meant by “democracy” in an international legal context and how the concept is to be applied in states that are broadly diverse in culture, history and resources – the more interesting questions fall into the second category. Why would democratic transitions be of interest to states in their relations purely *inter se*? What would be the consequences of enshrining a concept of democratic legitimacy as a rule of international law? And how would a norm of democratic governance relate to other foundational tenets of the international legal order, such as recognition of states and governments, non-intervention and the protection of human rights?

These questions generally do not arise in the case of other human rights, for however vigorously other states may condemn acts of torture or discrimination, for example, there is no necessary connection between violations of those rights and continued normal relations between the violating and condemning states. Indeed, depending on the human rights treaty involved, the condemning state may not even have a means by which

guarantee political rights, protect economic freedoms and foster an environment where peace and development can flourish”). See also Gregory H. Fox & Brad R. Roth, *The Spread of Liberal Democracy and its Implications for International Law*, in FOX & ROTH, *supra* note 2, at 6-7.

⁵ See generally DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995).

to assert a claim for the violation itself.⁶ I will suggest that in the case of a democratic entitlement, by contrast, broader relations between states are necessarily implicated by debate over whether the right is respected. As the case of apartheid South Africa suggests, a principle of regime legitimacy potentially affects *every* area of interaction between a suspect state and the rest of the international community.

II. GROUNDING OF RIGHT TO DEMOCRATIC GOVERNANCE

Even apart from the distortions of the Cold War era, it is not surprising that the idea of a democratic norm came late to international law. In the early stages of the Westphalian era, when the states of Western Europe were still consolidating their control over territory and acquiring the various governmental functions soon to be understood, collectively, as the attribute of national sovereignty, international law was very much in service of the state-building enterprise.⁷ In asserting a monopoly of authority over the territory, the first imperative for states was to forbid external interference in national politics. Accordingly, as the state's monopoly on domestic authority became entrenched, especially with the rise of justificatory ideologies of nationalism in the 19th Century, international law endowed domestic political institutions with a wall of protection both from interference by other states and from any international norms dictating the ways in which government ought to be structured.⁸

As in the case of most human rights, this virtual exclusivity of domestic control persisted until after the Second World War. And as with other rights, concerted international interest emerged slowly, first with the Universal Declaration of Human Rights in 1948 and thereafter in the various

⁶ Some human rights instruments allow for optional procedures whereby one state party can bring a complaint against another. See, e.g., International Covenant on Civil and Political Rights, art. 41, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, 999 U.N.T.S. 171 (1966); American Convention on Human Rights, Nov. 21, 1969, art. 45, 11 U.N.T.S. 123; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, G.A. Res. 39/46, Annex 39, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). However, few state parties have accepted state-to-state procedures.

⁷ See generally DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY* (2001); STEVEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS (Sohail Hashmi ed., 1997).

⁸ See Gregory H. Fox, *The Right to Political Participation in International Law*, in FOX & ROTH, *supra* note 2, at 50-51. Excluded, of course, were the acts of western states in what is now the developing world. Because European international law of the time did not regard these territories as states, the actions of colonial powers occurred wholly outside this general principle of non-interference. See WALTER C. PELLO, JR. & STEPHEN J. ROSOW, *THE NATION-STATE AND GLOBAL ORDER* 161-80 (1999).

regional and global human rights instruments that followed. Each of these instruments contained an article guaranteeing, in differing formulations, a right to participate in national government, including the right to periodic and genuine elections.⁹ Two aspects of these treaty articles are noteworthy. First, unlike the other rights set out in post-War treaties, enjoyment of the right to political participation is limited to "citizens." This stands in contrast to the scope of a state's obligations in regard to other rights, which must be guaranteed "to all individuals within [a state party's] territory and subject to its jurisdiction."¹⁰ The treaties thus posit standards for the conduct of relations between governments and their citizens, a radical departure from the old non-intervention principle.¹¹

Second, the Universal Declaration, the foundational document of the human rights regime, describes not only the substance of the right but also the theory of popular sovereignty on which the right is based. In the words of Article 21: "The will of the people shall be the basis of the authority of government." This assertion of a political teleology suggests a link between exercise of a right to political participation and the legitimate exercise of political power, a connection not present in the elaboration of other rights. The right to participation thus implies that when governmental power is brought to bear on citizens, that power takes on a special hue, for citizens are the ultimate repositories of authority for the government to act under any circumstances. This view is familiar as social contract theory.

But one cannot conclude from the text of these instruments that notions of Lockean contractarianism entered general international law, or even the law binding on parties to human rights treaties. While the treaties were widely ratified, the precise meaning of the right to political participation remained highly indeterminate.¹² Cold War divisions produced irreconcilable divisions on the legitimacy of "peoples democracies," the acceptability of one-party states and other issues related to electoral structure and fairness, such as state ownership of media outlets. If serious debate over these sorts of

⁹ See International Covenant on Civil and Political Rights, *supra* note 6, art. 25; Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 262 (1952); American Convention on Human Rights, *supra* note 6, art. 23; African Charter on Human and Peoples' Rights, art. 13, June 27, 1981, OAU Doc. CAB/LEG/6713 rev. 5, 21 I.L.M. 581 (entered into force Oct. 21, 1986). For a discussion of these treaty provisions, see Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 540 (1992).

¹⁰ International Covenant on Civil and Political Rights, *supra* note 6, art. 2(1).

¹¹ See Allan Rosas, *Article 21*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 299 (Asbjorn Eide, et al. eds., 1992) (article 21 of the Universal Declaration is "primarily concerned with members of a given political community (citizens) rather than with individuals as such").

¹² On normative determinacy generally, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 50-66 (1990).

issues seems inconceivable today, it may be useful to recall a representative statement of the Soviet delegate to the Third Committee of the General Assembly during debate over the Universal Declaration: "in his country, the bourgeois class had ceased to exist. There thus remained only workers and peasants, and the Communist Party by itself was capable of looking after their interests . . . Under the prevailing system, there was no justification for the creation of other parties."¹³ In this climate, with the lone exception of a few decisions of the European Commission and Court of Human Rights, international human rights bodies produced virtually no jurisprudence that might clarify the possible meanings given to such treaty terms as "genuine periodic elections,"¹⁴ "free elections,"¹⁵ "the free expression of the will of the voters,"¹⁶ and "the right to freely participate in the government of his country."¹⁷

The end of the Cold War and the fall of various forms of authoritarian government in all regions of the world have had, what might be termed, qualitative and quantitative consequences for the treaty-based right to political participation. Qualitatively, an increasingly rich jurisprudence emanating from human rights treaty bodies, and an even richer repertoire of practice by international election observers, has clarified most, if not all, definitional ambiguities in the right to political participation.¹⁸ The question of the legitimacy of the one party state, for example, has been answered resoundingly in the negative, with all major treaty bodies opining that an election cannot be considered free and fair in the absence of party pluralism.¹⁹ UN election observers have also consistently rejected the blanket exclusion of non-incumbent parties or selective exclusions based on ideology, ethnicity or other grounds prohibited by anti-discrimination norms.²⁰

This rather unique combination of jurisprudential convergence and widespread practice (occurring mostly in regions of the world in which opposition to western notions of pluralism was strongest during the Cold War), has done much to clarify and standardize both general principles of political participation and specific criteria concerning elections. While one

¹³ U.N. GAOR 3d Comm., 3d Sess, 134th mtg. at 471, U.N. Doc. A/C.3/SR. 134 (1948) (statement of Mr. Pavlov).

¹⁴ International Covenant on Civil and Political Rights, *supra* note 7, art. 25(b).

¹⁵ Protocol to the European Convention, *supra* note 9, art.3.

¹⁶ American Convention on Human Rights, *supra* note 6, art. 23.

¹⁷ African Charter on Human and Peoples' Rights, *supra* note 9, art. 13(1).

¹⁸ See FOX & ROTH, *supra* note 2, at 53-69. The Human Rights Committee described in detail the requirements of Article 25 of the Political Covenant in a 1996 general comment. See International Covenant on Civil and Political Rights, Gen. Cmt. 25, U.N. GAOR, 57th Sess., 1510th mtg. (1996).

¹⁹ See FOX & ROTH, *supra* note 2, at 55-69.

²⁰ *Id.* at 82-84.

must be careful not to overstate the case, it appears that whereas legal questions of participation once blended seamlessly into broad debates of political theory, the law in this area is now discrete, clear and relatively bereft of debilitating ideological baggage. Few examining the treaty right to political participation now dispute that virtually all parties seeking to participate in an election must be permitted to do so²¹; that opposition parties must be given equal access to mass media²²; that elections must be supervised by independent bodies unaffiliated with any particular party with a stake in the outcome²³; that ballots must be secret²⁴; and that suffrage must be universal.²⁵

Some may argue that positing these requirements as binding norms amounts to retrofitting Cold War-era treaty language with meaning not evident to (or even intended by) its drafters. Given the profound consequences that may follow from a principle of democratic legitimacy, bearing, among other things, on norms of recognition and the use of force,²⁶ an agreement on the right's positivist bona fides is an essential first step. It is certainly true that the degree of textual clarity now evident to treaty bodies such as the Human Rights Committee²⁷, the American Commission on Human Rights²⁸ and the European Court of Human Rights²⁹ is a recent

²¹ See GUY GOODWIN-GILL, *FREE AND FAIR ELECTIONS: INTERNATIONAL LAW AND PRACTICE* 52-61 (1994). Most systems impose minimal thresholds of demonstrated support among the electorate. The European Commission of Human Rights has upheld these requirements. See *X v. Federal Republic of Germany*, App. No. 6850/74, 5 Eur. Comm'n H.R. Dec. & Rep. 90, 94 (1976). In addition, there is much support for the view that demonstrably anti-democratic parties may be excluded from elections. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1 (1995).

²² GOODWIN-GILL, *supra* note 21, at 67-71.

²³ *Id.* at 35-42.

²⁴ *Id.* at 74-75.

²⁵ *Id.* at 42-46.

²⁶ See, e.g., DAVID MALONE, *DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI, 1990-1997* (1999) (discussing the Security Council's refusal to recognize the Haitian junta that overthrew the elected president and eventual decision to authorize the use of force to restore the president to office).

²⁷ General Comment 25, *supra* note 18 (detailing requirements of the right to political participation under article 25 of the Covenant on Civil and Political Rights, and noting that "article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant"); *Bwalya v. Zambia*, Communication No. 314/1988, UN Doc. CCPR/C/48/D/314/1988 (1993) ("[R]estrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.")

²⁸ See, e.g., Inter-American Commission on Human Rights, *Andres Aylwin Azocar et al. v. Chile*, Report No. 137/99, Case 11,863, para. 45 (Dec. 27, 1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/Chile11.863.htm> ("[T]he concept of representative democracy and its protection is so important and such an essential part of the hemispheric system that it not only sets it forth in its texts, from the first documents, but an entire mechanism of hemispheric protection has been put in place to address a breakdown of democracy in any of the member states.").

phenomenon.³⁰ One must be careful not to claim the entire history of these treaty clauses as evidence of a broader customary democratic entitlement. But there are several reasons to regard the developments of the 1990s as contributing to a treaty-based right that is remarkably coherent and, as such, increasingly legitimate in the eyes of state parties. First, as indicated, there is virtual unanimity among the bodies charged with interpreting human rights treaties regarding the elements of participatory rights. This is not a practice whose relevance to treaty norms is tenuous or indeed controversial; it is as “official” and ideologically neutral an understanding of the meaning of the right as international law can provide. If there is an argument to be made that the treaties’ initial indeterminacy ought to preclude a later emerging consensus on meaning, such an argument has not been accepted by these bodies.³¹ No such indeterminacy is evident, for example, in a recent opinion of the Inter-American Commission on Human Rights: “there is a conception in the inter-American system of the fundamental importance of representative democracy as a legitimate mechanism for achieving the realization of and respect for human rights; and as a human right itself, whose observance and defense was entrusted to the Commission.”³² Or, in the more succinct statement of the European Court of Human Rights: “[d]emocracy is without doubt a fundamental feature of the European public order.”³³

Second, there is a parallel body of practice that reinforces the textual determinacy emerging from treaty body jurisprudence. This is the increasingly frequent involvement of global and regional international organizations in monitoring national elections.³⁴ The standards of fairness

²⁹ See, e.g., *Case of Matthews v. United Kingdom*, Appic. No. 24833/94, para. 42 (Feb. 18, 1999), available at <http://www.echr.coe.int/eng> (“[a]rticle 3 of Protocol No. 1 enshrines a characteristic of an effective political democracy”).

³⁰ For a discussion of Cold War-era conflicts over the meaning and import of participatory rights, see Henry J. Steiner, *Political Participation as Human Right*, 1 HAR. HUM. RTS Y.B. 77 (1988). Although the African Commission on Human and Peoples’ Rights has not followed its fellow human rights treaty bodies in addressing matters of textual ambiguity, it has issued several strongly-worded condemnations of coups against elected regimes and voiced support for regular elections. See FOX & ROTH, *supra* note 2, at 66-68.

³¹ The rules of treaty interpretation certainly allow recent practice to clarify the meaning of text, whether as “ordinary meaning,” subsequent practice or otherwise. See Vienna Convention on the Law of Treaties, art 31, May 23, 1969, 1155 U.N.T.S. 331.

³² *Aylwin v. Chile*, *supra* note 28, para. 46.

³³ *Case of the United Communist Party of Turkey v. Turkey*, No. 133/1996/752/951, para. 45 (Jan. 30, 1998), at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1219192552&Notice=>

³⁴ See POSTCONFLICT ELECTIONS, DEMOCRATIZATION, AND INTERNATIONAL ASSISTANCE (Krishna Kumar ed., 1998); YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1998); GUY S. GOODWIN-GILL, CODES OF CONDUCT FOR ELECTIONS: A STUDY PREPARED FOR THE INTER-PARLIAMENTARY UNION (1994); CARL W. DUNDAS, ORGANISING FREE AND FAIR ELECTIONS AT COST-EFFECTIVE LEVELS (1993) (study prepared for Commonwealth Secretariat).

promulgated by monitors, and, by extension, the organizations they represent, have consistently paralleled treaty based-participatory rights on questions such as the necessary neutrality of the body supervising elections, the requirement of party pluralism, etc.³⁵ An argument can be made that the practice of monitoring is an even more significant indicator of consensus on standards, since monitors are confronted at every turn with overwhelming political pressures to compromise. Declaring an election to be in some sense “unfair” promises almost certain political upheaval in the monitored state. It also poses a difficult decision for other states as to whether they should recognize a regime holding power after a legally suspect election. That monitors have not succumbed to these very real pressures, and have been willing on occasion to deem the results of certain elections invalid, suggests a willingness to subordinate an expedient stability to the notions of democratic legitimacy represented by electoral fairness.³⁶ International law has traditionally accorded substantial weight to normative choices borne of such circumstances.

The quantitative developments involve the extent to which notions of popular participation and democratic legitimacy have emerged as components of international norms that are themselves unrelated to democracy. An example is protection of the environment, which instruments and resolutions of international organization increasingly describe as dependent on transparent decision-making by government, full public participation, and a free flow of information from regulators to citizens and vice-versa.³⁷ Another area is the recognition criteria for new states and governments, adopted both by individual states and international organizations. Traditionally, notions of democratic legitimacy had little role in either case, and indeed appeared to be affirmatively excluded by decisions such as the *Tinoco* arbitration.³⁸ But in settings such as the dissolution of the Former Yugoslavia and Soviet Unions, disputes over the credentials of delegates to the UN General Assembly, and collective non-recognition of usurping military regimes in Haiti, Sierra Leone, and Pakistan, the principle

³⁵ See generally FOX & ROTH, *supra* note 2, at 85-89.

³⁶ One recent example of many that could be cited is reaction to the October 15, 2000 elections in Belarus, which the U.S. State Department, the OSCE and the EU concluded “were not free, fair or transparent.” As a result, the United States stated that it did not “accept the results of the elections and will continue to accept the democratically elected 13th Supreme Soviet, led by Chairman Semyon Sharetsk, as the legitimate parliament of Belarus.” U.S. Department of State Office of the Spokesman: Statement by Philip T. Reeker, Deputy Spokesman, *Belarus: Elections on October 15 Were not Democratic*, available at <http://secretary.state.gov/www/briefings/statements/2000/ps001016a.html> (Oct. 16, 2000).

³⁷ See Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. INT’L ENV. L. 51 (1997).

³⁸ *Tinoco Concessions Arbitration*, 1 R.I.A.A. 369 (1923).

of democratic legitimacy has prevailed.³⁹ Two international organizations – the EU and MERCOSUR – have gone a step further and limited their membership to “democratic” states.⁴⁰

As these and other areas of international law come to resemble national regulatory regimes – both in the subjects they address and the degree of their complexity – treaty drafters have begun to infuse their implementation mechanisms with democratic values. States with unrepresentative and non-transparent bureaucracies are unlikely to foster the cultures of compliance so necessary for these regimes to succeed. While the lack of financial resources and trained personnel, as well as pervasive instability and other factors, are surely important reasons for the failure of many developing countries to implement international regulatory obligations, empirical research suggests problems of governance may be an equally important variable.⁴¹ In particular, those who defend expenditure of international organizations’ scarce resources on democratization efforts argue that democratic governance is an essential prerequisite to progress on a variety of other social goals.⁴²

But to accept the view that international regimes have come to resemble their domestic counterparts (in environment, minority protection, criminal procedure, etc.) does not require privileging democratization over other conditions undoubtedly conducive to effective governance. It is simply to understand that international law has taken a significant leap forward in positing a link between democratization and effective implementation of norms. Recognizing this limited but essential function of democratic governance has, I would argue, significant implications for the status of a democratic norm itself. It suggests that the sources of democratic norms are now three-fold: human rights treaties containing participatory rights clauses, the practice of international election monitors, and the proliferation of participatory mechanisms in international regulatory regimes.

³⁹ For a comprehensive discussion, see Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in FOX & ROTH, *supra* note 2, at 123, 143-51.

⁴⁰ Treaty on European Union, Title I(F), 31 I.L.M. 256 (1992); *Protocol de Ushuaia Sobre Compromiso Democrático en el Mercosur, la Republica de Bolivia y la Republica de Chile*, arts 4 & 5 (1996), available at www.idrc.ca/laero/investigacion/mercosur2.html.

⁴¹ See, e.g., United Nations Development Programme, *Overcoming Human Poverty: UNDP Poverty Report 2000*, ch. 5 (2000), available at www.undp.org/povertyreport/chapters/chap5.html.

⁴² *Id.*

III. DEMOCRATIZATION AND THE INTERESTS OF THE INTERNATIONAL COMMUNITY

This link to other normative goals suggests that international law's concern with democracy is substantially broader than a focus on the benefits transitions may bring to citizens of a single state, either individually or collectively. Prior to the end of the Cold War, inter-state discussion of democratization, if it occurred at all, was marked by such a limited domestic focus. In this it closely resembled debate among political theorists or scholars of comparative politics.⁴³ The dominant questions were whether democracy is appropriate to particular states or regions and, if so, what form it should take.⁴⁴ But as national governments have been asked to assume ever more onerous burdens in implementing complex international regulatory regimes, the nature of this discussion has shifted. Democracy is now linked to the realization of collective community goals, borne of the *inter-state* relations that form the substance of international law. These newer justifications posit claims about how democratic societies act collectively as subjects of international law. They suggest, with important caveats, that democratic states are more likely to further the goals of contemporary international law, particularly those of the new regulatory regimes.⁴⁵

The "democratic peace" thesis is perhaps the best-known example of these inter-state justifications – the view that democratic states do not go to war with each other.⁴⁶ Democratic governance is hypothesized to further one of the essential goals of the post-war international legal order: "to maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace."⁴⁷

⁴³ Some post-Cold War political science literature retains this focus. See, e.g., HELED, *supra* note 5.

⁴⁴ This was essentially the nature of debate over participatory rights articles in the Universal Declaration and the International Covenant on Civil and Political Rights. See ROSAS, *supra* note 11; MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS : CCPR COMMENTARY (1993).

⁴⁵ The U.S. State Department has made this claim in extremely broad terms, asserting that democratic states further virtually every foreign policy goal of the United States. "Democratically governed nations are more likely to secure the peace, deter aggression, expand open markets, promote economic development, protect American citizens, combat international terrorism and crime, uphold human and worker rights, avoid humanitarian crises and refugee flows, improve the global environment, and protect human health." *Mission Statement for the Office of Democracy, Bureau of Democracy, Human Rights and Labor, U.S. Department of State* (May 5, 2000) [hereinafter *Mission Statement*], available at www.state.gov/www/global/human_rights/democracy/drl_democ_mission.html.

⁴⁶ See JOHN M. OWEN IV, LIBERAL PEACE, LIBERAL WAR: AMERICAN POLITICS AND INTERNATIONAL SECURITY (1997); DEBATING THE DEMOCRATIC PEACE (Michael E. Brown & Sean M. Lynn-Jones eds., 1996); BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE (1993).

⁴⁷ U.N. CHARTER, art. 1, para. 1.

The Security Council has made this connection twice in the exercise of its Chapter VII powers, finding the overthrow of a legitimate elected government to justify the use of military force in order to return the elected leaders to power. In the case of Haiti in 1994, the Security Council called for "restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement," and found that the Haitian military's failure to do so constituted a threat to the peace.⁴⁸ In the case of Sierra Leone in 1998, the Council also found a military coup to constitute a threat to the peace and demanded in Resolution 1132 that "the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order."⁴⁹ The Council later commended an African regional organization for its intervention to restore the government of Ahmad Tejan Kabbah.⁵⁰

Another, related justification is the role of democratic institutions in preventing or resolving civil conflict within states. This view, articulated by the UN Secretary-General among others, is that rights to political participation address the exclusionary and divisive politics at the heart of many civil wars.⁵¹ A third justification (noted above), is the evident compatibility between the goals of democratic institutions and increasingly complex international regulatory regimes. Especially where regimes require governments to target and alleviate social ills in impoverished areas, a lack of political accountability can present a significant barrier to implementation. The United Nations Development Program has noted this phenomenon in assessing whether multilateral anti-poverty programs actually result in poverty reduction:

When governments are unaccountable or corrupt, poverty reduction programmes have little success in targeting benefits. The poor cannot gain a hearing for their views from undemocratic and authoritarian political regimes. They cannot gain access to public services from an unresponsive central bureaucracy – or know that they services exist if they lack information. Even when services are

⁴⁸ SC Res. 940, U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940 (1994).

⁴⁹ SC Res. 1132, U.N. SCOR, 3822d mtg., I, U.N. Doc. S/RES/1132 (1997).

⁵⁰ U.N. Doc. S/PRST/1998/5 (26 Feb. 1998).

⁵¹ *See Report of the Secretary-General on the Work of the Organization*, para. 98, U.N. Doc. A/55/1(2000). ("[T]he provision of electoral assistance is a vital component of the United Nations system's overall peace-building and democratization strategies.")

decentralized, the poor might not benefit if a local elite diverts the resources for its own interests.⁵²

A final and very recent example involves the role of international human rights norms in transitional justice. Shortly after German unification, courts in the newly unified state convicted three former East German citizens of involvement in the deaths of persons attempting to escape over the Berlin Wall. After their convictions were affirmed by the German Constitutional Court, the three brought a claim to the European Court of Human Rights, arguing that their acts had not been criminal under the East German laws in force at the time they were committed, and that their convictions constituted an *ex post* imposition of new standards in violation of Article 7(2) of the European Convention on Human Rights.⁵³ The European Court unanimously rejected their claims, finding no violation.⁵⁴

Of interest for present purposes is the concurring opinion of Judge Levits, who addressed the question of whether courts in a democratic state were bound to pay deference to the interpretive methodologies of courts in non-democratic states. His inquiry responded to the applicants' claim that even if East German law could be read to prohibit their acts, no East German court would have condemned their actions on that basis. This applied equally, they argued, to international human rights treaties, to which East Germany was party, and which also arguably prohibited their acts at the border. The defendants' argument, in other words, relied on the status accorded human rights norms in East German law. For Judge Levits, these claims implicated the very different ways democratic and non-democratic states approach the rule of law, including international human rights law:

Democratic States can allow their institutions to apply the law – even previous law, originating in a pre-democratic regime – only in a manner which is inherent in the democratic political order (in the sense in which this notion is understood in the traditional democracies). Using any other method of applying the law (which

⁵² *Overcoming Human Poverty*, supra note 41. These conclusions were accepted by the UN Commission on Human Rights in a resolution entitled *Continuing Dialogue on Measures to Promote and Consolidate Democracy*, UN Doc. E/CN.4/Res/2001/4 (Apr. 23, 2001). See also the March 22, 2001 remarks of Italian Foreign Minister Lamberto Dini, warning a meeting of Horn of Africa Foreign Ministers that development in the region would be difficult "without democratic institutions that respect human dignity and basic human rights." HORN OF AFRICA: IRIN-HOA Update (Mar. 22, 2001).

⁵³ Case of Streletz, Kessler and Krenz v. Germany, Application Nos. 34044/96, 35532/97 and 44801/98 (Mar. 22, 2001), available at <http://www.echr.coe.int/eng>.

⁵⁴ *Id.* at 38.

implies reaching different results from the same legal texts) would damage the very core of the *ordre public* of a democratic state.

- The same principles are equally valid with regard to the interpretation and application of the norms of international law, like the International Covenant on Civil and Political Rights. The Covenant has been signed and ratified by most states in the world – democratic and non-democratic (including the former GDR). A democratic state can interpret and apply the Covenant (and other international legal norms) only according to the methodology of application of the law which is inherent in the democratic political order. In the present case that was done by the German domestic courts . . .

Consequently, interpretation and application of national or international legal norms according to socialist or other non-democratic methodology (with results intolerable for a democratic system) should from the standpoint of a democratic system be regarded as wrong. That applies both to ex post facto assessment of the legal practice of previous non-democratic regimes (as in the instant case, although the same situation may obviously arise in other new democracies) and to assessment of the actual legal practice (e.g. regarding the Covenant) of today's non-democratic regimes. That practice should be regarded as a misuse of law. After the change to a democratic political order the persons responsible cannot rely for justification of their conduct on the "specific" way in which law is interpreted by non-democratic regimes.⁵⁵

On the view suggested by these examples, effective implementation of trade, environmental, human rights, judicial assistance and other complex regulatory regimes, is more likely to take place when the implementing state permits broad citizen participation, practices transparency in important aspects of governmental decision-making, possesses an independent judiciary and allows vigorous media scrutiny of its actions. States lacking some or all of these attributes are unlikely to compel substantial adherence to their own domestic laws save through force. This inability to secure compliance is likely to extend to international regimes as well.⁵⁶

⁵⁵ *Id.* at 46.

⁵⁶ For an extended discussion of these points, see Gregory H. Fox, *Strengthening the State*, 7 IND. J. GLOBAL LEG. STUD. 35 (1999).

One hastens to add that a lack of democratic institutions clearly does not exhaust the possible reasons for non-compliance with international obligations. Other impediments, such as a lack of resources, disruptive interventions by other states, and the lingering effects of profound social traumas such as colonialism, prolonged civil conflicts, and long-standing authoritarian rule, clearly affect compliance.⁵⁷ Equally, hegemonic states may see little advantage in adhering to norms that only constrain their actions in situations of potential gain.⁵⁸ It is difficult to imagine, for example, a policy-maker in any but the most powerful of states declaring publicly, “‘international law’ in political and military matters is increasingly exposed as an academic sham.”⁵⁹

But for those inquiring into how an emerging democratic norm has been assimilated into the larger body of international law, the point is not whether or not a case can be made for democratization as the sole explanatory variable in a state’s adherence or non-adherence to international law. Normative evolution is not a phenomenon gauged by empirical inquiry into whether a new rule of international law has accomplished its intended goal. The inroads made by a purported rule are measured rather by reference to the broader legal frameworks of which the new norm is a product and in which it would be situated. Thomas Franck has described such confluence with existing rule structures as the quality of “adherence,” drawing on H.L.A. Hart’s distinction between primary and secondary rules.⁶⁰ In the case of the democratic entitlement, the synergy with the norms described above suggests that the rule is “more likely to obligate” because it is in fact “made within the framework of an existing normative hierarchy.”⁶¹

Yet disjunctions with existing norm structures are evident as well. Two issues deserve particular attention: the problem of democratic legitimation and the problem of a normative hierarchy.

⁵⁷ See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY, COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 14 (1998) (“[i]n developing countries, the characteristic situation is a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems”).

⁵⁸ For a discussion of this phenomenon in the United States, see EDWARD C. LUCK, *MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATION 1919-1999* (1999). This view is supported by empirical data showing that democratic states are not more likely than other states to adhere to treaty commitments. See Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT’L ORG. 109 (1996).

⁵⁹ John R. Bolton, *Clinton Meets “International Law” in Kosovo*, WALL ST. J., Apr. 5, 1999, at 23.

⁶⁰ FRANCK, *supra* note 12, at 183-84.

⁶¹ *Id.* at 184

IV. THE PROBLEM OF DEMOCRATIC LEGITIMATION

Unlike most other internationally protected rights, democratic rights are instrumental. Rights of bodily integrity, due process and freedom of conscience for example, find justification in notions of human dignity or autonomy that do not depend on the political context in which protected individuals find themselves. Instead, violations of these rights are condemned because the notions of personhood embodied in the rights are instantly diminished upon the occurrence of a prohibited act. By contrast, rights of participation derive from a democratic theory holding that political power is legitimated only through manifestations of popular consent; in the remarkable words of the Universal Declaration of Human Rights, "the will of the people shall be the basis of the authority of government."⁶² The value of participatory rights is thus inseparable from the legitimation of political authority achieved by their exercise. Participatory rights have little value in isolation where this link to political authority is severed, such as when the military and not elected officials wield actual power in a state.⁶³ Those who participate in elections do so in order to imprint their views on national policy, and not simply to vote or stand as a candidate for its own sake.⁶⁴

On this view of democratic theory, the presence or absence of participatory rights in a state calls into question the authority of leaders to govern. The United States adheres to this principle in its own law. At least since the early 1960s, federal courts have exercised equitable power to overturn the results of elections tainted by fraud or other irregularities -- instances, in other words, where participatory rights were not substantially respected.⁶⁵ International organizations have articulated the instrumentalist view most clearly in condemning military coups that oust elected regimes.⁶⁶ The Inter-American Commission on Human Rights found that the Chilean system of designating certain un-elected military officers "senators for life"

⁶² Universal Declaration of Human Rights, art. 21(3), GA Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948).

⁶³ Larry Diamond, *Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation*, in BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 52, 64-5 (Tom Farer ed., 1996).

⁶⁴ Data suggest that such objectives have empirical grounding: "in any given country, the greater the opportunities for expressing, organizing, and representing political preferences, the greater the number and variety of preferences and interests that are likely to be represented in policy making." ROBERT A. DAHL, *POLYARCHY* 26 (1971).

⁶⁵ See generally Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. Rev. 1092 (1974).

⁶⁶ In a June 1999 speech, the Secretary-General of the Commonwealth declared that "no longer would the Commonwealth tolerate any one of its members slipping back into military rule or one-party dictatorship." Cultures of Democracy: A Commonwealth Perspective (June 21, 1999), available at www.thecommonwealth.org/html/info/info/speeches/997-1.htm.

had the effect of “watering down the real value of the popular vote, as it accords priority to military institutions and officers who have nothing to do with the performance of the legislative functions of the representative body.”⁶⁷ This violates the participatory rights set out in the American Convention, which require

at least that popular sovereignty be capable of being exercised without any unjustified discrimination that works a real loss of value in the power of the vote. A Senate composed in the terms provided for by the Chilean Constitution does not guarantee the free expression of the will of the voters, for the institution of designated senators contained in Article 45 of the Constitution of Chile detracts a significant quota of power from the citizen will.⁶⁸

How far should this link between participatory rights and governmental authority be taken? Applied unsparingly to all governments, a theory of democratic legitimacy would reject the authority to govern not only of usurping military juntas but long-standing monarchies and other regimes either un-elected or achieving power through sham elections. This would seem to set international law on a collision course with much of every day international relations, which simply could not function unless such regimes were regarded as the legitimate representatives of their states. There is little practice to suggest the international community is prepared to delegitimize each and every regime that fails to respect participatory rights in all their particulars. No such long-standing regime has had its delegates' credentials refused, had recognition by other states withdrawn, or been the subject of an outside intervention on the grounds that it lacked a popular mandate to rule. On the other hand, actions such as military coups against elected regimes, where the popular sentiment has been made plain and then clearly disregarded, are increasingly the subject of condemnation and sanction.

The challenge for international lawyers is to find coherence in this rather inconsistent application of the democratic legitimacy principle.⁶⁹ The

⁶⁷ *Aylwin v. Chile*, supra note 28, para. 108.

⁶⁸ *Id.* para. 116.

⁶⁹ To muddy the waters further, even clear cases of electoral irregularities sometimes produce ambiguous reactions. The U.S. government described its view of the 2000 elections in Peru as follows:

[L]ast year's Peruvian presidential and congressional elections were considered flawed by Peruvian and international observers. The organizations observing the elections,

difficulty lies in the fact that the principle itself does not appear to allow for selective application. If popular consent is indeed “the basis of the authority of government,”⁷⁰ then an illegitimate regime so defined should be disqualified from acting on behalf of the state.⁷¹ The agency relationship between the regime and the state, when defined by principles of democratic legitimacy, is severed and the authority of the regime to govern withdrawn. The right of a people to resist and, ultimately, oust a regime acting contrary to their interests is central to contractarian notions of popular sovereignty. The “right of revolution” against illegitimate regimes lay at the origin of the American democratic system and continues to attract modern theorists.⁷²

But when democratic rights are embodied in international law, the actors affected by its violation are not citizens denied opportunities for participation, but other states. As with any international norm, the obligation to provide democratic governance is state-to-state in nature, and, in the event of a breach, the aggrieved right-holders are the states to whom the obligation runs. Perhaps more importantly, other states must also refrain from recognizing the consequences of the breaching state’s illegal acts -- this in order to deprive that state of any ill-gotten gains.⁷³ For example, in order to

including the Organization of American States, shared the view that the repeated irregularities in the electoral process prevented the Peruvian citizenry from participating in credible democratic elections. As a result, President Alberto Fujimori began his third presidential term *under a cloud of illegitimacy* in late July 2000.

Hearing Before the House Comm. on Int’l Relations, Subcomm. on W. Hemisphere (Mar. 14, 2001) (statement of Susan S. Westin, Managing Director, International Affairs and Trade, General Accounting Office) (emphasis added).

⁷⁰ Universal Declaration, *supra* note 62, art. 21.

⁷¹ Ernst-Ulrich Petersman suggests how broadly such a legitimacy principle might sweep:

There is also a need to consider the apparent contradictions between the human rights premises of democratic constitutions and the state-centered and power-oriented premises of classical international law. If human rights require all governments to protect individual freedom and the equal rights of their citizens, and the legitimacy and rights of governments derive from respect for the political human rights of their citizens and for democratic decision-making procedures, do the international law principles of sovereignty and non-intervention also shield dictatorial governments that suppress the human rights of their citizens? Does the contribution of state practice to the formation of customary law rules depend on the democratic legitimacy of governments? Is it consistent with universal human rights to continue conceptualizing international law as based on state-centered principles of effectiveness and legal order regardless of the democratic legitimacy of governments?

Ernst-Ulrich Petersman, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT’L L. & POL. 753, 762 (1999).

⁷² See, e.g., Michael Walzer, *The Moral Standing of States*, 9 PHILOS. & PUB. AFF. 209, 214 (1980).

⁷³ This principle is often expressed in the maxim *ex injuria jus non oritur*. See IAN BOWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 511-12 (4th ed. 1990).

make concrete the prohibition on the unilateral use of force, states may not recognize the forcible annexation of another state's territory.⁷⁴ In the case of democratic rights, the international community or, at a minimum, other state parties to human rights treaties containing participatory rights, would seem obligated to avoid treating the illegitimate regime as the proper agent of its state. Otherwise they would confer upon the regime the very thing sought by the undemocratic usurpers: the capacity to exercise power in the name of the state. For other states, simply carrying on normal bilateral relations would appear to confer such a status, since the regime would be treated as appropriately holding rights and incurring obligations in the name of the state. Here it is important to keep in mind that it is the state and not its government that carries international personality and becomes subject to the rules of international law. A democratic legitimacy principle would deny non-democratic regimes status as agents of the state, much like the rules of domestic law define which natural persons are entitled to act as agents for legal persons (corporations, partnerships, etc).

In light of this rather black and white conception of governmental legitimacy, it is useful to consider the potential spectrum of cases in which the rule would be applicable. At one end, the easiest case, would be the overthrow of a leader who had been chosen in an election declared to be free and fair by one or more international organizations. This more or less fits the situation of Haiti in 1991 and Sierra Leone in 1994. Not only did the UN Security Council declare the coups "illegal" in both cases, but it approved the use of external military force to restore the elected leaders to power. Given the widespread and geographically diverse condemnations of coups cited above, it seems safe to conclude that the legitimacy principle is not in danger

⁷⁴ In Resolution 662 (1990), the Security Council declared that the Iraqi annexation of Kuwait "under any form and whatever pretext has no legal validity and is considered null and void." More generally, the International Law Commission provides in its Draft Articles on State Responsibility that where a state commits "serious breaches of international obligations owed to the international community as a whole," all other states must adhere to the following obligations:

- (a) Not to recognize as lawful the situation created by the breach;
- (b) Not to render aid or assistance to the responsible State in maintaining the situation so created;
- (c) To cooperate as far as possible to bring the breach to an end.

Draft articles provisionally adopted by the Drafting Committee on Second Reading, U.N. Doc. E/CN.4/L.600, art. 42, para. 2. (2000). However, when presented with the opportunity to hold a forcible annexation void per se, without further action by international political bodies, the International Court of Justice declined to do so in the East Timor Case. See *Case Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 4. For a critical view of the Court's approach to collective non-recognition in this case, see Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273, 306-10 (2000).

of being compromised in such cases. If it were, the norm would face a direct and substantial challenge. For the international community to validate a particular regime as democratically legitimate, and then engage in an equally, or perhaps more, effective validation of that regime's usurper, would clearly transfer both decisions from the realm of law to that of politics. The evidence discussed above suggests that such a reflexive acceptance of any regime exercising effective control in a state is simply no longer acceptable.

A less clear-cut case of legitimacy would involve accretions of power short of overturning the results of an election. President Alberto Fujimori's arguably unconstitutional 1992 dissolution of the Peruvian Congress and sacking of judges fits this category.⁷⁵ Likewise, Second Prime Minister of Cambodia Hun Sen's 1997 assumption of powers legally delegated to the First Prime Minister, an event widely described as a "coup."⁷⁶ In each of these cases, action was taken that arguably diluted the voters' preferences by substantially altering the political and legal landscape they had approved in an election. Unlike the straightforward ouster of an elected leader these acts were not only taken by incumbent leaders, who were themselves elected, but deeming the acts "illegal" presented difficult questions of constitutional interpretation. Legitimacy norms, such as the Inter-American Democratic Charter⁷⁷, clearly do not provide that every unconstitutional act of a government vitiates its authority to rule. On the other hand, the condemnation of Hun Sen and Fujimori's actions suggests the international community is prepared to question the democratic legitimacy of regimes whose acts fall short of outright coups d'état. As Steven Schnably has shown, when the legality of such acts is unclear under national law, their permissibility under broad-brush international standards of "democracy" becomes highly uncertain.⁷⁸ For this reason, one may regard the differing outcomes in such cases not as a compromise of the democratic legitimacy principle, but as a consequence of its application to legally ambiguous sets of facts.

A third scenario, perhaps residing at the opposite end of the spectrum, involves the regime that has long held power without an election or with elections that clearly do not measure up to international standards.

⁷⁵ See Domingo E. Acevedo & Claudio Grossman, *The Organization of American States and the Protection of Democracy*, in FARER, *supra* note 63, at 140-42.

⁷⁶ See Orna Ben-Naftali & Antigoni Axenidou, "Accredito" Ergo Sum: Reflections on the Question of Representation in the Wake of the Cambodian Representation Problem in the Fifty-Second Session of the General Assembly, 27 DENV. J. INT'L L. & POL'Y 151 (1998).

⁷⁷ See Inter-American Democratic Charter (Sept 11, 2001), available at http://www.oas.org/Charter/docs/resolution1_en_p4.htm.

⁷⁸ See Stephen Schnably, *Constitutionalism and Democratic Government in the Inter-American System*, in FOX & ROTH, *supra* note 2, at 123, 143-51.

Most regimes in the Arab countries of the Middle East would fit this category.⁷⁹ As noted, there is virtually no precedent for action by international organizations or individual states challenging the legitimacy of such regimes. Is there any basis in the principles of democratic governance now emerging to distinguish non-democracies of long endurance from the widely condemned perpetrators of coups against elected leaders? One basis for doing so would be the claim that citizens may approve of an un-elected regime, and in particular one holding power for many years, even though they have not been asked to formalize their preferences in an election. It might be argued that if citizens have not risen up in rebellion against such a regime, the international community should at least, in Michael Walzer's terminology, presume a "fit" between the regime and the citizenry.⁸⁰ Walzer justifies such a presumption on the grounds that the right of any people to rebel against their government cannot be transferred to outsiders seeking, in essence, to foment a revolution in their stead:

[A] state is legitimate or not depending upon the 'fit' of the government and community, that is, the degree to which the government actually represents the political life of its people. When it doesn't do that, the people have a right to rebel. But if they are free to rebel, then they are also free not to rebel – because they (or the greater number of them) judge rebellion to be imprudent or uncertain of success or because they feel that 'slowness and aversion . . . to quit their old Constitution,' which Locke noted in his *Second Treatise*. That is, they still believe the government to be tolerable, or they are accustomed to it, or they are personally loyal to its leaders. And so arguments about legitimacy . . . must be addressed to the people who make up a particular community. Anyone can make such arguments, but only subjects or citizens can act on them.⁸¹

The argument is thus: unlike the demonstrable expression of public choice evident in an election reversed by a coup, the legitimacy of a long-standing authoritarian government is unknown. Walzer does acknowledge that in certain extreme cases, such as widespread massacres or an attempted

⁷⁹ Each country must, of course, be evaluated on its own terms. Yemen would likely not fit in this category. Egypt holds regular elections, though severe restrictions on parties and criticism of the government color their fairness. Lebanon also holds regular elections under a carefully calibrated scheme negotiated at the end of the civil war. Critics, however, point to Syrian domination of Lebanese politics as a severe restriction on the ability of elected officials to put the views of their constituents into practice.

⁸⁰ Walzer, *supra* note 72, at 214.

⁸¹ *Id.*

secession, a lack of “fit” *should* be presumed.⁸² But short of such radical estrangement between government and citizenry, one cannot presume that the lack of free and fair elections means that a government does not find favor with some or most of its citizens. Given a lack of efforts to oust the regime, one should presume the opposite.

It is certainly too soon in the evolution of a democratic entitlement to tell whether this argument is sufficient to rescue an apparently absolutist theory of legitimacy. There are certainly reasons why this argument is not entirely persuasive as a limiting principle. After all, the fundamental purpose of an election is to put the legitimacy of a regime to empirical test, and for a regime to resist empirical validation while insisting that validation is to be presumed strains credulity. On the other hand, from the perspective of the democratic entitlement, it may not be sufficient “even for a dictatorship to hold a verifiably honest plebiscite on the continuation of dictatorial rule, since the ‘proper conditions’ for the exercise of popular will require a remaking of authoritarian institutions to allow for knowing, willing and intelligent collective choice.”⁸³ What is more likely is resistance to an absolutist principle on other grounds: that it runs counter to the universalist aspirations of most international organizations; that it casts doubt on the principle of juridical equality among states; and that it may severely impair the practicalities of day-to-day diplomatic exchange. Whether a coherent norm emerges from this critique is fodder for future scholars.

V. THE PROBLEM OF A NORMATIVE HIERARCHY

A second problem arises from the claim that the principle of democratic governance sits atop a normative hierarchy. Tom Farer describes this view of democratic governance as a “master right” – one “that, if it exists, would serve as the keystone of the entire human rights apparatus.”⁸⁴ Assuming a goal of protecting the broad range of human rights, the international community ought to focus its energies on transitions to democracy, for regimes accountable to their citizens are more likely to institutionalize the protection of human rights in domestic law.⁸⁵ Given the

⁸² *Id.* at 216-18; see also MICHAEL WALZER, *JUST AND UNJUST WARS* 86-108 (2d ed. 1992).

⁸³ Gregory H. Fox & Brad R. Roth, *Introduction: the Spread of Liberal Democracy and its Implications for International Law*, in FOX & ROTH, *supra* note 2, at 14.

⁸⁴ *The Human Right to Participate in Government: Toward an Operational Definition*, 82 AM. SOC'Y INT'L L. PROC. 505 (1988) (remarks of Professor Farer).

⁸⁵ United Nations organs have issued broad endorsements of democratic governance as crucial to securing adherence to human rights. See, e.g., G.A. Res. 55/96, U.N. GAOR, 55th Sess., (2001). (“[r]ecognizing the indissoluble link between human rights as enshrined in the Universal Declaration of Human Rights and in the international human rights treaties and the foundation

unfortunate weakness of international human rights institutions, the most promising strategy for international law is to secure reliable enforcement through domestic mechanisms. Thus, according to the hierarchical view, a democratic entitlement not only promises the most effective means of securing human rights, but it relieves international institutions of an enforcement role for which they are eminently unsuited.

A variety of reasons are offered for the relation between representative government and respect for human rights. Most derive from the view that the exercise of power by representative institutions, and in particular the regular transfer of authority pursuant to agreed-upon rules rather than by force of arms, is fundamentally grounded in the rule of law and respect for individual rights.⁸⁶ Principles recognizing a citizen's entitlement to alter the direction of national policy, it is claimed, are necessarily broad enough to protect the physical and intellectual integrity of each citizen. John Stuart Mill offered the more pragmatic argument that the public's rights and interests will only be secure if citizens themselves participate in their protection.⁸⁷ Otherwise, citizens rely wholly on the good will of the few who monopolize political power: "in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns."⁸⁸ Thus, "the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them."⁸⁹

It seems a small step from this "master right" view to regarding free and fair elections as the preeminent goal of the human rights movement. Pragmatic concerns bolster this conclusion. Elections are relatively easy to monitor and assess when compared to other protected rights.⁹⁰ While some accuse international election observers of focusing on an unjustifiably narrow set of criteria in determining an election's fairness – often arriving, it is claimed, only after the bulk of a campaign is over and deploying only in large

of any democratic society"); Report of the Secretary-General: Supplement to Reports on Democratization, UN Doc. A/51/761, Annex, para. 3 (1996) ("the practice of democracy is increasingly regarded as essential to progress on a wide range of human concerns and to the protection of human rights").

⁸⁶ See generally, Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, in FOX & ROTH, *supra* note 2, at 389, 396-99. For the view that such claims wrongly conflate substantive democracy, popular sovereignty and constitutionalism, see Brad R. Roth, *Evaluating Democratic Progress*, in *id.* at 493.

⁸⁷ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 55-80 (Prometheus Books 1991) (1859).

⁸⁸ *Id.* at 66.

⁸⁹ *Id.* at 65.

⁹⁰ See *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC'Y INT'L L. PROC. 249, 270 (1992) (remarks of Gregory H. Fox).

cities⁹¹ – such missions would appear as models of breadth and precision if one tries to imagine efforts that could realistically be mounted to monitor rights against torture, due process in criminal proceedings, arbitrary execution, freedom of expression, freedom of association, etc. International organizations are simply not equipped to provide comprehensive oversight of the myriad state institutions potentially involved in violating these and other rights protected by treaty. At most, they might study a state's human rights record retrospectively and make recommendations for reform or accountability, as opposed to efforts to halt abuses as they occur.⁹² It is difficult to imagine the international community securing better compliance with other rights than is now achieved in regard to elections.

Apart from criticizing the priority of elections in transitions to more liberal societies,⁹³ one may raise concerns even if the “master right” hypothesis were accepted on its own terms. First, a focus on elections may lead to profound definitional confusion as to when a regime has become, is about to become, or has ceased to be “democratic.” Given the many consequences that may follow from a finding of democratic illegitimacy, as detailed above, clarity in this area is no small concern. Fareed Zakaria describes a class of states he labels “illiberal democracies,” ones in which reasonably fair elections take place but fail to protect a variety of other civil and political rights.⁹⁴ If measured solely by electoral fairness, these states might well be entitled to all the benefits international law offers to democratically legitimate regimes. Yet, if shortfalls in other areas of human rights are taken into account, as seems necessary, given that one of the prime justifications for an election-centered view of democracy is better protection of human rights generally, how is the legitimacy of a regime to be measured? Should the criteria be expanded to include all other internationally protected human rights? If only a few “crucial” rights factor into the legitimacy calculus, which ones are to be included? Must the violations be widespread and systematic, or are a few, high-profile violations sufficient? Does it matter that violations occur during a government campaign against a rebel insurgency movement that itself commits egregious human rights violations?

These are the types of questions that lead some to conclude that

⁹¹ See Thomas Carothers, *The Observers Observed*, 8 J. DEMOC. 17 (July 1997).

⁹² For a graphic account of the international community's failure to heed clear warnings about violence in Rwanda – later the object of retrospective justice in the form of an international criminal tribunal, see GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995).

⁹³ See Susan Marks, *International Law, Democracy and the End of History*, in FOX & ROTH, *supra* note 2, at 532, 564 (arguing that “[d]emocracy involves no necessary order of events”). But see Dahl, *supra* note 64, at 33-47 (arguing that sequencing in democratic transitions is correlated to the long-term stability of democratic institutions).

⁹⁴ See Fareed Zakaria, *The Rise of Illiberal Democracies*, FOREIGN AFF. Nov./Dec. 1997, at 22.

democracy is an “essentially contested concept,” one incapable of agreed quantification and therefore precise definition.⁹⁵ In the realm of political theory this is entirely appropriate, as many hold with Isaiah Berlin that arguments about political liberty are marked by an ineluctable plurality of values.⁹⁶ But when democratic legitimacy is deployed as a legal rule by institutions wielding power to exact consequences for non-compliance, definitional clarity is essential. We may well be able to muddle through by speaking of elections and “associated rights,” but the close case, demanding exacting scrutiny, is sure to arise.

Second, the construction of a normative hierarchy is not simply an exercise in abstraction; it draws crucial support from empirical hypotheses about the likely social benefits of transitions to democracy. The United States, for example, claims that democratic states outperform other regimes in areas as diverse as peacefulness, economic development and public health.⁹⁷ Are such hypotheses valid? One would certainly receive a negative answer from many citizens in Russia and former communist countries in Eastern and Central Europe, states in which the transition to “democracy” has been accompanied by an increase in social pathologies of virtually every kind. For these people, as for many in the developing world, the normative hierarchy suggested by the democratic entitlement is exactly backwards: economic and social rights, among others, must be the primary goal, for they have not been secured (as hypothesized) as a secondary consequence of political democracy. One can well imagine how the arguments in this well-rehearsed debate would proceed. The point here is not to defend an empirical claim but to suggest the precariousness involved in tethering a normative framework to such a claim.

VI. CONCLUSION

Despite the many dangers lurking in advancing democratic governance as a norm of international law, it is my view that the international community has reached a point of no return on this question. This is not primarily because of a profound philosophical commitment to the principle of popular sovereignty; while many states hold such a view, it is also clear that many do not. It is rather due to international law’s ever-growing concern with issues related to governance. Inter-state relations increasingly focus not on areas beyond national jurisdiction (the high seas), the nature of states

⁹⁵ See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC. 107 (1956).

⁹⁶ See Isaiah Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969).

⁹⁷ See *Mission Statement*, *supra* note 45.

themselves (the acquisition of territory), points of interaction involving official representatives (diplomatic relations, armed conflict) or legal fictions defining when and how a state has been injured (expropriation, diplomatic protection, state responsibility), but on acts solely within national territory having no necessary or direct effect on other states. International lenders such as the World Bank, the IMF and various regional banks are intimately involved in the budgeting priorities of many states in the developing world. Regional economic integration, well underway in Europe and beginning or planned in Latin America, Africa and South East Asia, involves standardization of every type of domestic regulatory norm. Environmental norms involve the creation of new or expanded domestic regimes, as well as transparent decision-making processes that allow citizens to bring environmental concerns to the attention of governments. The proposed International Criminal Court will require many states to revise their criminal procedure laws in order to cooperate with the Court in the manner set out in the Rome Statute.⁹⁸ Likewise, human rights tribunals have passed on all manner of governance questions, from amnesty laws to the banning of political parties and candidates to the extradition of criminal suspects.

If international law is now a presence in virtually every area of national policy, it cannot be expected to withdraw from the question of which governing institutions are best suited to carry out these policies efficaciously. The question of “good government” simply arises too often in the work of too many international organizations for it to become a secondary issue. And, as states recognize that the most serious global issues require collective action among strong and efficient national institutions – one thinks of efforts to combat global warming and regulation of the internet – a focus on governance will be all but inevitable. For international lawyers, this explosion in practice, directly relevant to the substance of a new and controversial norm, is a challenge for future analysis and scholarship.

⁹⁸ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9, art. 3. The treaty must be ratified by 60 countries before it comes into force.